STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2007
v MARCOS RAMIREZ-GARCIA, Defendant-Appellant.	No. 261408 Wayne Circuit Court LC No. 04-011607-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MIQUEL PEREZ-HERNANDEZ, Defendant-Appellant.	No. 261729 Wayne Circuit Court LC No. 04-011607-01

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

In Docket No. 261408, defendant, Marcos Ramirez-Garcia, appeals as of right his jury convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

In Docket No. 261729, defendant, Miquel Perez-Hernandez, appeals as of right his jury convictions for first-degree murder, MCL 750.316, and felony-firearm, MCL 750.227b. We affirm.

Garcia first argues that the evidence was not sufficient to support his conviction for second-degree murder. Garcia also argues that the verdict is against the great weight of the evidence. We disagree. This Court reviews an insufficiency of the evidence claim "in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court reviews unpreserved great weight of the evidence

claims for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

To prove second-degree murder, the prosecution must show that there was: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). For second-degree murder, malice can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Bulmer*, 256 Mich App 33, 36-37; 662 NW2d 117 (2003).

To support a finding that a defendant aided and abetted a crime, the prosecutor must show: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).

The evidence was sufficient for a jury to conclude that the elements for a second-degree murder conviction were proven under an aiding and abetting theory. The evidence showed that, while Fabian Ponce-Mejia and Fernando Sanchez were walking to Sanchez's van, a black Dodge Stratus with three men inside drove by shouting at them. Mejia exchanged words with the men. Sanchez and Mejia separated while walking to the alley. Moments later Sanchez heard gunshots and saw Mejia lying on the ground. Mejia died from multiple gunshot wounds. The medical examiner concluded that there were at least two handguns involved in Mejia's shooting.

The prosecution presented evidence connecting Garcia to the shooting. In Garcia's post-arrest statement, which was read into evidence, Garcia maintained that he and "Chino" got into a fight with rival gang members at the International Club that night. Hernandez is also known as "Chino." Garcia maintained that he, "Chino" and David Tapia left the club and went driving around in "Chino's" black Dodge near El Comal. Garcia said that a guy from the alley walked toward the car when "Chino" stated, "very much Count, whore and he fired the shots at him." Garcia said "Chino" fired about three or four shots. Garcia also claimed he fired a shot from his .25 caliber handgun in the air because he did not want the others to think he was afraid.

Although Garcia denied his involvement in the shooting, the evidence was sufficient to prove second-degree murder. Mejia was shot several times while walking in an alley near El Comal and he died from multiple gunshot wounds. Thus, the evidence was sufficient to show that a death occurred. The evidence was also sufficient to show that the death was aided by an act of Garcia with malice and without justification or excuse. See *Fletcher*, *supra*. According to Garcia, after feuding with rival gang members, they went driving around El Comal and during this time words were exchanged between them and Mejia. Thereafter, shooting occurred and Mejia was dead.

Garcia admitted that he shot a .25 caliber handgun that night, but maintained that he only shot the handgun in the air and after Mejia was already on the ground. Although the police

failed to recover a nine millimeter weapon during the search, the evidence sufficiently showed that Garcia possessed or had access to at least three different caliber weapons, which would lead to the inference that he could have access to more weapons or that he was untruthful about the weapon he used that night. Evidence was presented showing that at least two nine millimeter handguns were involved in Mejia's death and that the police recovered two .38 caliber handguns, 20 rounds of .38-caliber ammunition, four spent rounds, and a bulletproof vest and photographs evidencing gang affiliation from the home where Garcia was arrested. Despite Garcia's claim that he did not know that "Chino" was going to shoot anyone that night and that the man was already on the ground when he fired his gun, a reasonable juror could conclude that the evidence presented showed otherwise.

Sufficient evidence was presented to show that Garcia acted with malice. Malice may be inferred from the facts and circumstances of the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). This Court has found that "the trier of fact may make reasonable inferences from direct or circumstantial evidence in the record." *People v Perkins*, 262 Mich App 267, 268-269; 686 NW2d 237 (2004). By Garcia's admission, he, Hernandez, and Tapia drove around El Comal, around 2:00 a.m., after feuding with rival gang members and they had loaded weapons. They were also driving in a car without interior or "dome" lights on. Words were exchanged between the men and Mejia and, thereafter, the shooting occurred. Garcia's actions of driving around 2:00 a.m., with a loaded weapon and after feuding with rival gang members, and then exchanging words with a suspected rival gang member, was sufficient to infer malice, i.e., intentionally setting in motion a force likely to cause death or great bodily harm. See *Bulmer, supra*.

The evidence failed to show that Garcia's actions were justified. No evidence was presented which showed that Mejia initiated the encounter or that Garcia acted in self-defense. See *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). When the shots were fired, Garcia, Hernandez, and Tapia were in the car and Mejia was walking near the alley. Although Garcia claimed Mejia was walking toward the car when the shots were fired, it is unlikely that Mejia posed an immediate threat to the men because there was no evidence of close range firing and no weapons were recovered from Mejia's body or the surrounding area. Based on the evidence presented, it is reasonable for a jury to infer that deadly force was used at a time when Mejia was not an immediate threat.

Although no evidence was presented showing that Garcia directly killed Mejia, sufficient evidence was presented which showed that Garcia aided and abetted in the killing. Garcia was Hernandez's passenger and they drove around El Comal around 2:00 a.m., with loaded weapons and after feuding with rival gang members. The evidence further showed that the men exchanged words with Mejia, who they suspected was a rival gang member. Thereafter, Garcia alleged that Hernandez fired several shots. "A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Robinson, supra*. The evidence presented was sufficient to support Garcia's second-degree murder conviction, i.e., that Mejia was shot and killed, by an act caused by Garcia, with malice, and without justification or excuse. See *Fletcher, supra*.

Garcia further argues that the verdict is against the great weight of the evidence. We disagree. A new trial may be granted on some or all of the issues if a verdict is against the great

weight of the evidence. MCR 2.611(A)(1)(e). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, *supra* at 218-219.

Here, the prosecution presented evidence showing that, around 2:00 a.m., Garcia was driving around in a black Dodge with Hernandez and Tapia near El Comal and words were exchanged between the men and Mejia. Thereafter, the shooting occurred. Before the shooting, Garcia, Hernandez, and Tapia were involved in a fight with rival gang members and they drove around the area near El Comal with the car lights off and with loaded handguns. Evidence was presented which showed that Mejia was shot several times and by at least two different nine millimeter handguns. No weapons were recovered from Mejia's body or the surrounding area. Garcia has failed to show that the verdict is against the great weight of the evidence.

Garcia further argues that prosecutorial misconduct denied him his right to a fair trial. We disagree. When properly preserved, claims of prosecutorial misconduct are reviewed by this Court de novo to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Where issues of prosecutorial misconduct are unpreserved, this Court reviews the record for plain error affecting substantial rights, and will reverse only if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id*., citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, *supra* at 450. The "propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Garcia argues that the prosecutor mischaracterized the evidence by implying during opening statement that he admitted to shooting at the victim. During Garcia's post-arrest statement, he denied shooting at Mejia, but he admitted that he fired his gun "towards the sky" after Mejia was already on the ground. Although the prosecutor's statement was only partially substantiated, Garcia has failed to show plain error requiring reversal. This Court has held that "when a prosecutor states that evidence will be submitted to the jury, and the evidence is not presented, reversal is not warranted if the prosecutor did so acting in good faith." *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). The record does not show that the prosecutor acted in bad faith when she made the statement. More importantly, Garcia's post-arrest statement discussing his role in the shooting was admitted into evidence, and the court instructed the jury that the lawyers' statements and arguments were not evidence and that it should "only accept things that the lawyers say that are supported by evidence or by [its] own common sense and general knowledge." Even if the challenged remarks had any prejudicial potential, the trial court's instructions were sufficient to eliminate any prejudice that may have stemmed from the prosecutor's statement. See *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

Garcia next argues that the prosecutor improperly introduced into evidence the guns, ammunition, casings, bulletproof vest, and photographs seized at the Longworth home. We disagree.

Garcia was arrested near the entrance of the Longworth home and the police recovered from the home two .38 caliber handguns, 20 rounds of .38-caliber ammunition, four spent rounds, and a bulletproof vest and photographs evidencing gang affiliation. Although Mejia died from bullets shot from nine millimeter handguns and not a .38 caliber weapon, the prosecution properly introduced the evidence. Garcia admitted to shooting a gun the night Mejia was killed, but there were inconsistencies regarding the weapon that he used. During Garcia's post-arrest statement, he maintained that he used a .25 caliber when he fired in the air. However, during Garcia's taped telephone conversation, he maintained that he used a .22 caliber handgun. When the Longworth home was searched two .38 caliber weapons were seized. Because Mejia was killed with bullets from nine millimeter handguns, and Garcia claimed he used a .25 or .22 caliber weapon, the evidence relating to the .38 caliber handguns was introduced to show that Garcia was not being truthful about the weapon that he used that night.

The evidence seized at the Longworth home was also admitted to further the prosecution's theory that the shooting was gang related and that Garcia assisted in the shooting based on his gang affiliation. The police recovered a bulletproof vest with graffiti art and photographs evidencing gang affiliation from the Longworth home. Even if the evidence was of "marginal relevance, prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecution's theory was that the shooting was gang related, and therefore, the evidence was intended to further the prosecution's theory. Garcia has failed to show that the prosecutor introduced the evidence in bad faith thus his claim of prosecutorial misconduct is without merit.

Garcia further argues that the prosecutor mischaracterized evidence during closing argument. We disagree. During closing argument, the defense objected to the prosecutor's argument that Mejia did not have a weapon. The statement was not improper because the evidence supported the statement. No evidence was presented showing that Mejia had a weapon that night and no weapons were recovered at the scene of the shooting. The prosecutor was "free to argue the evidence and any reasonable inferences that may arise from the evidence." See *Ackerman*, *supra*.

Garcia also argues that he was denied the effective assistance of counsel. We disagree. Because the trial court did not hold an evidentiary hearing, review is limited to the facts on the record. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, if a claim of ineffective assistance of counsel involves a question of law, this Court's review is de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *Id*. Thus, the

defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Garcia argues he was denied the effective assistance of counsel because his counsel failed to use an interpreter when he consulted with him before trial. Garcia claims that his counsel's failure to consult with him with the aid of an interpreter before counsel moved for an evidentiary hearing prevented him from participating in his defense. We disagree.

In Garcia's post-arrest statement, he admitted that he, Hernandez, and Tapia were involved in an altercation with rival gang members hours before the shooting and that they went driving around the area of El Comal in Hernandez's black Dodge thereafter. Garcia also maintained that Hernandez started shooting at "the guy" because he was coming towards the car. Garcia admitted to firing a single shot in the air that night, but only after the guy was on the ground. Garcia's post-arrest statement was the primary evidence linking him to the shooting.

"Defendants who face incarceration are guaranteed the right to counsel at all critical stages of the criminal process by the Sixth Amendment." *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005). An evidentiary hearing was conducted to determine the voluntariness of Garcia's statement. During this time a Spanish-speaking interpreter was provided. We are unable to determine if counsel used the aid of an interpreter during his initial meetings with Garcia; however, the record shows that an interpreter was provided during Garcia's evidentiary hearing. During the evidentiary hearing, Garcia testified regarding the voluntariness of his statement and he maintained that he was coerced and threatened when he made the statement. Garcia also claimed that he was not read his constitutional rights and that he signed several papers without reading the contents. Officer Moises Jimenez also testified regarding Garcia's statement and, based on the testimony presented, the court found that the statement was voluntarily given.

Because defense counsel was able to move for an evidentiary hearing based on Garcia's claims of threats and coercion, Garcia was able to communicate with his counsel regarding the involuntariness of his confession before the evidentiary hearing. It also appears from the record that Garcia was able to convey to the court that he believed that his interrogation was improperly conducted. Although Garcia argues that he requested an attorney but the police continued to conduct the interrogation, Garcia has failed to present any evidence that he was unable to convey to his attorney this claim at the same time he informed his attorney regarding the threats and coercion. Garcia has failed to show that counsel was ineffective. Even if counsel failed to use the aid of an interpreter, Garcia was able to convey to counsel the need to move for an evidentiary hearing and Garcia was able to present to the court his allegations of threats and coercion during the hearing. Garcia has failed to show that counsel was ineffective, and therefore, Garcia has failed to show that he was denied a fair trial.

Garcia also argues that counsel was ineffective for failing to request separate trials. We disagree. Although defendant has the right to a fair trial, defendant does not have an absolute right to a separate trial. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). Defendant argues that severance was necessary because evidence submitted against Hernandez spilled over and caused him prejudice. However, incidental spillover prejudice is insufficient to require severance. *Id*. at 349.

Separate juries tried Garcia and Hernandez and certain evidence that was admitted against Garcia was not admitted against Hernandez, and vice versa. A motion to sever would have been futile because "incidental spillover prejudice is insufficient" to mandate severance, and therefore, defense counsel did not err by failing to request severance. See *id*.; *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002), quoting *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Hernandez also argues that he was denied the effective assistance of counsel. Hernandez argues his defense counsel was ineffective for failing to request a hearing to challenge the voluntariness of his post-arrest statement. We disagree.

A criminal confession is admissible if made "freely, voluntarily, and without compulsion or inducement of any sort." *People v Daoud*, 462 Mich 621, 631; 614 NW2d 152 (2000). The confession may not be obtained through the use of any form of "threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Id*. at 632. Although Hernandez argues his confession was involuntary, the record fails to support this claim. According to Officer Jimenez, Hernandez was read his constitutional rights before he made his statement. Officer Jimenez, who speaks both Spanish and English, maintained he translated the English version of the "rights form" into Spanish for Hernandez, and Hernandez signed the form indicating that he understood his rights. Another bilingual officer was also present when Hernandez was read his rights and he consented to the questioning. Officer Jimenez concluded that Hernandez was not under the influence of drugs or alcohol, sick, or deprived of food or water during this time. Officer Jimenez asked Hernandez if he was willing to talk to him and answer some questions and Hernandez replied affirmatively. Officer Jimenez also said Hernandez did not request an attorney or request that the interview cease at anytime.

The police read Hernandez his rights, and translated them into Spanish, Hernandez said that he understood them, and he signed and initialed the waiver form. Hernandez offers no evidence to support his claim that his statement was involuntary; however, the record shows that Hernandez confessed to the crime after he was read his constitutional rights and he indicated that he understood his rights. Based on the evidence presented, we conclude that Hernandez's confession was voluntary. Counsel is not obligated to make futile objections and motions. *Milstead*, *supra*. Because the record does not support Hernandez's claim that his confession was involuntary, Hernandez has failed to show that counsel was ineffective for failing to challenge the statement in an evidentiary hearing, or object to the statement at trial.

Hernandez also argues that defense counsel was ineffective for failing to challenge the evidence seized at the Longworth home. We disagree. The evidence showed that the police recovered from the Longworth home photographs of Hernandez possessing a gray semi-automatic handgun, two .38 calibers handguns and ammunition, and evidence of gang affiliation. Despite Hernandez's contentions, his counsel did object to the introduction of the evidence and he moved for a mistrial on this basis. Counsel argued that because Hernandez was already in custody when the Longworth home was searched the evidence seized during that search pertained to Garcia, not his client. Both defense counsels moved the court for a mistrial; however, the court denied the motions. The court found that the evidence was not a separate bad act but an issue relevant to the case. Because defense counsel objected to the evidence, Hernandez's ineffective assistance of counsel claim is without merit.

Lastly, Hernandez argues that the trial court improperly denied his motion for a directed verdict of acquittal on the charge of first-degree murder. We disagree. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To prove first-degree murder the prosecution must show that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); see, also, MCL 750.316(1)(a). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). To support a finding that a defendant aided and abetted a crime, the prosecutor must show: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement. *Robinson*, *supra*.

As discussed above, the evidence showed that while Mejia and Sanchez were leaving El Comal, a black Dodge Stratus with three men inside drove by shouting at them. Mejia exchanged words with the men. Sanchez and Mejia separated while walking to the alley. Moments later Sanchez heard gunshots and saw Mejia lying on the ground. Mejia died from multiple gunshot wounds. The medical examiner concluded that there were at least two handguns involved in Mejia's shooting.

Testimony was presented against Hernandez showing that he owned a black four-door Dodge Stratus in 2004, but the vehicle "disappeared." The police recovered from the Longworth home photographs of Hernandez possessing a gray semi-automatic handgun and evidence of his gang affiliation. The evidence also showed that in Hernandez's post-arrest statement he admitted his involvement in the shooting. According to Hernandez, he and rival gang members fought earlier at the International Club. Hernandez maintained that from there he went to El Comal and noticed one of the rival gang members exiting the alley. Hernandez said "the guy, like picked up his shirt and we fired at him." Hernandez claimed he only fired once, but the other person with him, Mileon, also fired his gun.

The evidence presented by the prosecution was sufficient for a reasonable jury to conclude that Hernandez had sufficient time to think about his actions before he pulled out his weapon and shot at Mejia. Premeditation may be inferred by the circumstances surrounding the killing. *Marsack*, *supra* at 371. It is reasonable for a jury to infer that Hernandez's actions were premeditated and deliberate because he went to the El Comal, around 2:00 a.m., after feuding with rival gang members and he went there with a loaded weapon. Hernandez was driving a car without interior or "dome" lights on. The shooting occurred and then Hernandez fled the scene.

The evidence was sufficient for a jury to conclude that the elements for a first-degree murder conviction were proven, i.e., that defendant intentionally killed Mejia and that the act of killing was premeditated and deliberate. See *Mette*, *supra*. Although no evidence was presented which showed that Hernandez was directly responsible for Mejia's death, the evidence showed

that Mejia died from multiple gunshot wounds and that Hernandez admitted to shooting at Mejia. The evidence also showed that at least two handguns were involved in Mejia's death. "A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Robinson, supra*. The trial court did not err in denying defendant's motion for a directed verdict of acquittal on the charge of first-degree murder.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette